

A Lee Lee Chong v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NOS A-05-37 AND A-05-38 OF 1995
GOPAL SRI RAM, AHMAD FAIRUZ AND HAIDAR JJCA
15 JUNE 1998

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Criminal Procedure — Appeal — Conviction, against — Accused charged with offence of trafficking in dangerous drugs — Convicted on lesser charge of possession — Cross-appeal by prosecution on conviction on lesser charge — Whether judge in amending charge had misdirected himself on evidence before him

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Evidence — Witness — Failure of prosecution to call witness — Informer was in fact agent provocateur — Prosecution failed to call informer as witness — Whether court should draw an adverse inference — Whether informer had exceeded assigned role

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The appellant ('the accused') was charged with an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act') but was convicted on a lesser charge of possession under s 12(2) read with s 39A(2)(a) of the Act. The accused appealed against his conviction and at the same time, there was a cross-appeal by the respondent ('the prosecution') against the conviction of the accused on the lesser charge. The court had to decide three main issues, namely: (i) whether or not the police informer was in fact an agent provocateur, in which if he is, failure on the part of the prosecution to call or make him available as a witness will give rise to an adverse inference against them; (ii) whether there was a discrepancy in the drug seized at the scene of the crime and that examined by the chemist, which would amount to a break in the chain of evidence; and (iii) the failure of the trial judge to take into account the fact that the accused attempted to flee from the scene.

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Held, dismissing the appellant's appeal but allowing the respondent's cross-appeal:

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(1) Whether a person is an informer or an agent provocateur depends upon the role played by that person in all the circumstances of the particular case. On the facts, the evidence showed that the informer was not merely present at the first meeting between PW8 and the accused but took an active part in the negotiations at that meeting. The judge was, therefore, correct in holding that the informer was an agent provocateur and had lost the protection afforded by s 40 of the Act (see p 704B-D); *PP v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 and *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 distinguished.

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(2) The failure to call the informer or to make him available as a witness to the defence was not fatal to the prosecution's case. There was no evidence within the prosecution's case suggesting that the informer took any further part in the transaction that led to the accused being charged for trafficking. The evidence of the

informer was neither relevant nor material to the allegation that the accused had delivered the drugs. A maximum evaluation of the evidence showed that the prosecution had made out a case of trafficking under s 39B of the Act (see pp 704E, I and 705A-B); *Arulpragasam all Sandaraju v PP* [1997] 1 MLJ 1 followed.

- (3) The drug seized by the police at the scene was the same drug that was examined by the chemist and later produced in court. There was no gap in the proof of the identity of the drug and as such, there was no break in the chain of evidence (see p 705D).
- (4) Flight or attempted flight from the scene of a crime is recognized as not in itself signifying guilt, for an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way (see p 705F).

[Bahasa Malaysia summary]

Perayu ('tertuduh') telah dituduh atas satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut') tetapi telah disabitkan atas pertuduhan lebih ringan pemilikan di bawah s 12(2) yang dibaca bersama s 39A(2)(a) Akta tersebut. Tertuduh telah merayu terhadap sabitannya dan pada waktu yang sama, terdapatnya rayuan bersaling oleh penentang ('pihak pendakwaan') terhadap sabitan tertuduh atas pertuduhan yang lebih ringan. Mahkamah perlu memutuskan tiga isu utama, iaitu: (i) sama ada pemberi maklumat polis adalah pada hakikatnya seorang ejen provokasi atau pun tidak, yang mana jika sesungguhnya ianya sedemikian, kegagalan oleh pihak pendakwaan untuk memanggil atau membuat beliau bersedia untuk hadir sebagai seorang saksi akan membangkitkan inferens yang bertentangan terhadap mereka; (ii) sama ada terdapatnya percanggahan pada dadah yang dirampas di tempat jenayah dengan yang diperiksa oleh ahli kimia, yang mana akan membawa kepada terputusnya rangkaian keterangan; dan (iii) kegagalan hakim perbicaraan untuk mengambil kira fakta bahawa tertuduh cuba untuk lari dari tempat jenayah itu.

Diputuskan, menolak rayuan perayu tetapi membenarkan rayuan bersaling penentang:

- (1) Sama ada seseorang itu merupakan pemberi maklumat atau ejen provokasi bergantung pada peranan yang dimainkan oleh orang itu dalam kesemua keadaan kes yang tertentu. Berdasarkan fakta-fakta, keterangan menunjukkan bahawa pemberi maklumat tersebut bukan sahaja hadir di mesyuarat pertama antara PW8 dan tertuduh, tetapi telah memainkan peranan yang aktif dalam perundingan di mesyuarat tersebut. Dengan itu, hakim telah bertindak betul ketika memutuskan bahawa pemberi maklumat tersebut merupakan seorang ejen provokasi dan telah kehilangan perlindungan yang diperolehi melalui s 40 Akta tersebut (lihat ms 704B-D); *PP v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 dan *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 dibeza.

- A (2) Kegagalan untuk memanggil pemberi maklumat tersebut atau membuatnya hadir sebagai saksi kepada pembelaan tidak memudaratkan kes pihak pendakwa. Tidak terdapat keterangan di dalam lingkungan kes pihak pendakwa yang menyarankan bahawa pemberi maklumat tersebut telah memainkan sebarang peranan yang selanjutnya dalam transaksi tersebut yang membawa kepada tertuduh dituduh bagi pengedaran dadah. Keterangan pemberi maklumat tidak relevan mahupun material kepada dakwaan bahawa tertuduh telah menghantar serah dadah tersebut. Penilaian maksima akan keterangan tersebut menunjukkan bahawa pihak pendakwa telah membentuk satu kes pengedaran dadah di bawah s 39B Akta tersebut (lihat ms 704E, I dan 705A-B); *Arulpragasam all Sandaraju v PP* [1997] 1 MLJ 1 diikuti.
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- D (3) Dadah yang dirampas oleh polis di tempat jenayah merupakan dadah yang sama dengan yang telah diperiksa oleh ahli kimia dan telah kemudiannya dikemukakan dalam mahkamah. Tidak terdapat sebarang kerenggangan dalam bukti identiti dadah tersebut dan oleh yang demikian, rangkaian keterangan tidak terputus (lihat ms 705D).
- E (4) Melarikan diri atau percubaan untuk melarikan diri daripada tempat jenayah tidak dengan sendirinya menandakan bersalah, kerana seseorang yang tidak bersalah yang berhadapan dengan keadaan bahawa beliau bakal ditahan atas satu pertuduhan hukum bunuh berkemungkinan akan bertindak dengan cara yang bodoh (lihat ms 705F).]

Notes

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 169-176.

For a case on failure of prosecution to call witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1695.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)

Arulpragasam all Sandaraju v PP [1997] 1 MLJ 1 (folld)

PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (dstd)

Ti Chuee Hiang v PP [1995] 2 MLJ 433 (dstd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 39A(2)(a), 39B, 40

Appeal from: Criminal Case No PCT-58-3 of 1992 (High Court, Ipoh)

K Kumarendran (Kumar & Sitham) for the appellant.

K Muniandy (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

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Introduction

The appellant, Lee Lee Chong ('the accused') was charged with an offence of trafficking 155gm of heroin on 30 March 1991 under s 39B of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution's case, the learned judge came to the conclusion that the charge had not been proved. He, however, found that the lesser charge of possession had been made out and therefore amended the charge to one under s 12(2) read with s 39A(2)(a) of the Act. Upon his defence being called on the amended charge, the accused elected to remain silent. The judge then convicted the accused on the amended charge and sentenced him to a term of 15 years imprisonment and 12 strokes of the rotan. The accused appealed against his conviction ('the appeal'). The Public Prosecutor, being dissatisfied with the conviction upon the lesser offence, also appealed ('the cross-appeal'). The appeal and cross-appeal came before us on 15 June 1998. At the close of arguments, we found ourselves in agreement with the arguments advanced on behalf of the Public Prosecutor. We, therefore, dismissed the appeal, allowed the cross-appeal and ordered the accused to make his defence upon the original charge of trafficking. The reasons for our decision now follow.

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The facts

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On 22 March 1991, ASP Badaruddin ('PW6'), having received information from a source regaling in the name 'Tiger Lim' ('the informer') that a Chinese male was trafficking dangerous drugs from Ipoh to Kuala Lumpur, mounted an operation to capture the offender. PW6 then introduced Constable Lim Thian Siong ('PW8') to the informer. PW8 was to act as a buyer of drugs, an agent provocateur, in order to flush out the suspected trafficker. The informer was to introduce PW8 to the suspected trafficker. At about 9.45pm on the same day, PW8 met the informer and the accused. Negotiations for the sale of heroin were conducted. The evidence reveals that both the accused as well as the informer took an active part in these negotiations. On the following day (23 March), PW8 communicated with the accused through the latter's pager and requested for the delivery of one pound in weight of heroin. Later that day, the accused informed PW8 that the drug in question was not available. On 24 March, the accused, by prior arrangement, delivered a pound of heroin to PW8 at the hotel into which PW8 had earlier checked in and received payment of RM4,000. The police had already decided not to arrest the accused on this occasion as they wanted to discover the person behind the trafficking. Five days later, on 29 March, PW8 contacted the accused and asked for five pounds in weight of heroin. The accused agreed to deliver it on the evening of the following day and indicated that the price would be RM4,000 per pound. A trap was set. In accordance with the accused's suggestion, PW8 met him at a bus stop near the hotel earlier mentioned. The accused was in car No ABK 7728. PW8 joined him in the car. The accused then

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A produced from under the front passenger seat occupied by PW8, a yellow plastic bag ('exh P-6'). Inside exh P-6 was another white plastic bag ('exh P-7'). Within exh P-6 were five plastic packets ('exh P-3(A1) to (E1)'), each of which was wrapped in a newspaper ('exh P-8(a) to (e)'). PW8 then asked the accused to drive to the hotel so that payment for the drugs could be made. On arrival at the hotel, PW8 alighted from the car and gave a pre-arranged signal to the police party lying in wait. Despite the accused's attempt to flee, he was arrested. Exhibit P-3(A1) to (E1) were seized and sent for chemical analysis. They were found to contain 155gm of heroin.

C In the appeal and cross-appeal before us, both sides raised three main issues. We will now deal with each of these.

Informer or agent provocateur?

D At the trial of the accused, the facts thus far summarized were adduced in evidence. However, the prosecution neither called nor made available the informer as a witness. They relied on s 40 of the Act which protects informers. But it must be mentioned that similar protection is not afforded to agent provocateurs who are usually important witnesses to the unfolding of the prosecution's case.

E At the close of its case, the prosecution argued that the informer had not played such a role in the transaction as to deprive him of the protection afforded by s 40. It was submitted that a case of trafficking had been made out which, if unrebutted, would warrant the conviction of the accused. Counsel for the accused, however, argued that the informer had, in the circumstances adduced in evidence, ceased to be a mere informer. He had played part of an agent provocateur and not a mere informer. The prosecution was therefore obliged to produce him as a witness of the narrative or at the very least offer him to the defence. Since neither course was adopted, an adverse inference must be drawn. It must be inferred that the evidence of the so-called informer, if adduced, would have been unfavourable to the prosecution. It followed that no case whatsoever had been made out against the accused.

H The learned judge did not accede to either of the extreme courses suggested in the foregoing submissions of the prosecution and the defence. Instead, he took a middle course. He found that the informer had indeed exceeded the narrow role assigned to him by law and had played the part of an agent provocateur. He held that the prosecution's failure to call the alleged informer as a witness resulted in an adverse inference being drawn against the prosecution, though not to the extent suggested by the accused. He found that on the evidence before him, only a case of possession had been proved.

I Before us, the finding of the learned judge was attacked both in the appeal and the cross-appeal. For the Public Prosecutor, it was submitted that the learned judge had gone too far in holding that the informer was in truth an agent provocateur. According to the learned deputy who argued the cross-appeal, no adverse inference could be drawn against the

prosecution for its failure to either call the informer or make him available to the accused.

Before we express our views on this branch of the case, we find it necessary to advert to two cases that deal with the point under discussion. Both are decisions of the apex court. The first is *Ti Chuee Hiang v PP* [1995] 2 MLJ 433. In that case, the appellant alleged that he had been enticed into a deliberate trap planned and organized by certain police officers and an alleged informer called Koh Loh and his friend. The trap was then sprung and the appellant apprehended after he had handed a bag containing a quantity of a dangerous drug to one Lian who acted as an agent provocateur. On his defence being called at the end of the prosecution's case, the appellant testified that he was an innocent carrier of the drug in question and that he had been asked by Koh Loh to hand the bag to Lian. The trial judge rejected the defence and convicted the appellant. On appeal, the Federal Court set aside the conviction and acquitted the appellant. After considering the salient aspects of the evidence, Edgar Joseph Jr FCJ, at p 440, said of the third person that:

... having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur for it was he who had put the appellant in touch with the undercover agent, Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus, he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the Act.

After examining several leading authorities on the duty of the prosecution to call material witnesses, his Lordship at p 440 accepted as:

... clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation — which is nothing less than a statutory duty — the accused must be acquitted.

He further held at p 440 that in the circumstances of that case, the informer Koh Loh:

... came within the category of witnesses described by Lord Roche in *Seneviratne*, as 'witnesses essential to the unfolding of the narratives on which the prosecution case is based'. The same might be said of the informer's friend.

Yet, neither the so-called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial judge for these glaring omissions.

The second decision that calls for consideration is *PP v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, the headnote to which sets out the facts of that case as follows:

- A** Following a tip from an informer, the police from the drug prevention unit started investigation on the operation of a drug syndicate in Perak. The informer introduced a police agent provocateur, who posed as a trafficker who wanted to buy cannabis, to the second respondent. The second respondent later took them to a house to see his 'partner', the first respondent. On 31 July 1991, the informer and the police agent provocateur returned to the house to carry out negotiations for the sale and purchase of cannabis with the respondents. When the police agent provocateur expressed his intention to inspect the merchandise, the second respondent took a slab of plant material which was wrapped with a transparent plastic from a room in the house. As planned, the informer was then asked to get the money from a car parked outside the house, and the police agent provocateur then excused himself to go to the washroom. At this time, the team of police which were stationed outside the house moved in to arrest the respondents. The plant material were confirmed to be cannabis by the government chemist. The two respondents were charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. At trial, the judge held that no prima facie case had been made out against the respondents, on the following grounds: (i) it was doubtful whether the cannabis produced in this case was the very cannabis seized by the police — there was a patent break in the chain of evidence as the chemist failed to give evidence as to how she handled the cannabis from the time she received it from the investigating officer until the time she handed them back to him; (ii) a person called Amran was also the occupier of the room from which the cannabis was taken, and hence the respondents could not be said to have exclusive custody and control of the drugs; (iii) the prosecution had failed to call Amran as well as the informer, who had actually played the role of an agent provocateur, as witnesses, and thus the court was entitled to draw adverse presumptions under s 114(g) of the Evidence Act 1950 ('the Act'); and (iv) the failure of police to, inter alia, lift fingerprints from the cannabis' wrapper and to take photographs of the street-lights in relation to the house, had grave adverse effect on the prosecution's case. The trial judge accordingly acquitted and discharged the respondents without their defence being called. The Public Prosecutor appealed.
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The Federal Court allowed the appeal. Chong Siew Fai CJ (Sabah & Sarawak) when delivering the judgment of the court said (at p 578):

- G** In *Munusamy v PP* [1987] 1 MLJ 492, Mohd Azmi SCJ (now FCJ) in delivering the judgment of the court, opined (at p 494) that 'whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case'. In our instant case under appeal, though Cholar introduced PW9 to the second respondent and was present when both transactions involving cannabis were struck, *there was no evidence that he had done anything apart from being present*. It appears obvious that his presence during the negotiation process and the transactions was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents. In *Namasiyiam & Ors v PP* [1987] 2 MLJ 336, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial) took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.
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On the particular facts and circumstances of the instant case under appeal, we are of the view that Cholar was not an agent provocateur. But even if he was, there is more than sufficient credible evidence of the

respondents' involvement in the negotiation and agreement to sell to PW9 the 902gm of cannabis subsequently brought out by the second respondent from room 'K' in the said house. (Emphasis added.)

The effect of these two decisions and the authorities referred to by the learned Chief Judge of Sabah and Sarawak in the latter case is that the question whether a person is an informer or an agent provocateur is one that depends upon the role played by that person in all the circumstances of the particular case. There is, in our view, no substitute for a meticulous examination of the facts of each case when seeking a resolution of the question.

In the present appeal, a review of the evidence shows that the informer was not merely present at the first meeting between PW8 and the accused. From all accounts, he took a very active part in the negotiations at that meeting. We are therefore satisfied that the learned judge was entirely correct in holding that the informer was an agent provocateur and had lost the protection afforded by s 40 of the Act. Nevertheless, we are, in the circumstances of the case, equally satisfied that the failure to call the informer or to make him available as a witness to the defence was not fatal to the prosecution's case. Our reasons for arriving at this conclusion are as follows.

Apart from playing a very active role at the meeting to which we referred a moment ago, there is no evidence within the prosecution's case suggesting that the informer took any further part in the transaction that led to the accused being charged for trafficking. Indeed, he appears to have dropped out of sight after that meeting. All further contact between PW8 and the accused were direct with no intervention of any intermediary. And the event that led to the arrest of the accused, namely the delivery of the promised five pounds of heroin, and upon which the charge against him is based, is entirely free of any participation by the informer.

We emphasize that this is not a case (such as *Ti Chuee Hiang*) where there was evidence from the appellant showing the participation of the informer in the actual delivery of the dangerous drug. Here, the accused was solely relying upon the prosecution's evidence to suggest that the informer had played a part in the incident forming the substratum of the charge. But it is clear that the evidence in its present state does not go that far.

We are also entirely conscious that this is not a case (such as *Mansor bin Mohd Rashid*) where the informer was merely present. We accept the learned judge's finding of active participation. Where we are unable to agree with him is that such active participation extended to the transaction at the heart of the charge.

To put it in another way, the evidence of the informer (who had by his conduct become an agent provocateur) was neither relevant nor material to the allegation that the accused had, at the request of PW8, delivered the drug which forms the subject matter of the charge. Accordingly, the prosecution's failure to call or make him available to the defence is of no consequence at this stage of the case. Whether it may be of consequence

- A after the accused has given his evidence is a matter of pure speculation into which we do not propose to indulge.

- A maximum evaluation of the evidence shows that, on the date and at the time specified in the original charge, the accused made delivery of the 155gm of heroin in the manner described by PW8. It follows that the prosecution had made out a case of trafficking under s 39B of the Act in accordance with the test laid down by the majority in *Arulpragasam a/l Sandaraju v PP* [1997] 1 MLJ 1.
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Identity of exhibit

- C The other point advanced by the accused in support of his appeal is that there had been a break in the chain of evidence. According to his counsel, there is a discrepancy in the drug seized at the scene of the crime and that examined by the chemist. Having carefully scrutinized the evidence, we are satisfied that the drug seized by the police at the scene was indeed the same drug that that was examined by the chemist and later produced in court. There was, therefore, no gap in the proof of the identity of the drug. Consequently, we find ourselves in agreement with the submission of the learned deputy that there was no break in the chain of evidence.
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Attempt to flee

- E The last point we would like to deal with is the learned deputy's submission in support of the cross-appeal that the learned judge failed to take into account the accused's attempt to flee the scene. By reason of the conclusion we have arrived at in this matter, we consider it unwise to make much comment on the argument advanced. Suffice to say that flight, or attempted flight, from the scene of a crime is recognized by high authority as not in itself signifying guilt for, 'an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way.' (See *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 at p 9, per Edgar Joseph Jr SCJ.)
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- G *Conclusion*

For the reasons already given, we came to the conclusion at the close of argument that this was a case in which the learned judge had seriously misdirected himself on the evidence led before him in support of the charge against the accused. The learned judge ought not to have amended the charge to one of possession. We, therefore, allowed the appeal and set aside the order of the learned judge. We also remitted the case to the learned judge with a direction to call the defence of the accused on the original charge.

- H *Appellant's appeal dismissed. Respondent's cross-appeal allowed.*
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Reported by Mohd Rizal Abidin